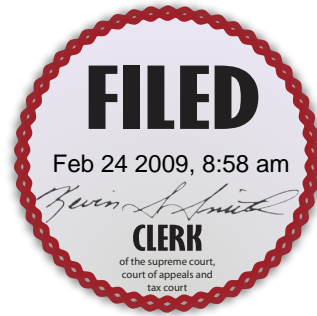


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE**  
**COURT OF APPEALS OF INDIANA**

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AARON S. BOWLAND and  
CHRISTINA BOWLAND,

Appellants,

vs.

RYOBI DIE CASTING (USA), INC.,

Appellee.

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No. 85A05-0805-CV-310

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APPEAL FROM THE WABASH CIRCUIT COURT  
The Honorable Robert R. McCallen III, Judge  
Cause No. 85C01-0408-CT-362

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**February 24, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Aaron S. and Christina Bowland (hereinafter collectively referred to as “the Bowlands”) challenge the trial court’s grant of summary judgment in favor of Ryobi Die Casting (USA), Inc., (“Ryobi”).

We affirm.

## ISSUE

Whether the trial court erred in granting summary judgment.

## FACTS

Ryobi operates a foundry in Shelbyville, Indiana, where it makes die-cast aluminum transmission housings for the automotive industry. During its manufacturing process, Ryobi coats large blocks of aluminum with a lubricant and shapes them with a lathe.<sup>1</sup> This process results in the accumulation of large quantities of scrap aluminum – dross, flashings, and turnings. Dross is the heavy oxide scum that forms on the surface of molten aluminum; flashings are oil-coated spillage that collects around the die-cast machines; and turnings are chips or shavings from the lubricated aluminum blocks, all of which can be recycled to recover usable aluminum.

Ryobi contracts with other foundries to recover usable aluminum from its scrap dross, flashings, and turnings, because it does not have the equipment or facilities to perform the work itself. During this process, known as aluminum reclamation, scrap

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<sup>1</sup> A “lathe” is defined as “a machine in which work is rotated about a horizontal axis and shaped by a fixed cutting, boring, or drilling tool” while being held in place. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1276 (1976).

aluminum is “charged”<sup>2</sup> into a furnace and melted. During the reclamation process, the lubricant coating on the aluminum must burn off for the usable aluminum to be recovered. It is known industry-wide that the presence of too much moisture trapped underneath molten aluminum can result in a flare-up or an explosion when the wet turnings are charged into a furnace.

Alumitech of Wabash (“Alumitech”), a foundry located in Wabash, Indiana, specializes in aluminum reclamation. In the 1990s, it regularly processed turnings as part of its business operations, using an on-site centrifuge<sup>3</sup> to remove moisture before processing. In 1998 or 1999, Alumitech dispensed with its centrifuge, and thereafter, primarily processed dross; it processed turnings with considerably less frequency, and only as a courtesy to customers, who placed simultaneous dross orders. Because dross can be processed most efficiently, it is generally considered to be the most desirable recyclable scrap aluminum.<sup>4</sup> Apparently, the process of recycling turnings and flashings takes considerably more time; therefore, they are deemed less desirable. The less moisture that is in scrap aluminum, the faster it can be processed; the faster the reclamation process, the less potentially-recoverable metal is lost in the furnace, and the more profitable the endeavor.

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<sup>2</sup> The verb “charge” is defined as “to load or fill to capacity or up to the required amount.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 377 (1976).

<sup>3</sup> A centrifuge is “a machine for whirling fluids rapidly to separate substance of different densities by centrifugal force.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 363 (1976).

<sup>4</sup> Aluminum reclamation is a “toll business,” as described by an Alumitech official, “it just means that [Alumitech] can get those pounds through [its] furnace quickly, and the more pounds [it] gets through the furnace, that’s how [it] make[s] . . . money.” (Bowlands’ App. 837).

In the spring of 2002, Alumitech's marking<sup>5</sup> materials manager Diane Reed ("Reed") learned that Ryobi's reclamation contract would be expiring and met with Ryobi's engineering manager Lynn Funk ("Funk") in an attempt to solicit Ryobi's aluminum reclamation business. The designated materials contain no evidence that Alumitech and Ryobi had any prior business dealings. At the time of their meeting, Ryobi's contract with another aluminum reclamation foundry was due to expire in the fall of 2002, and Alumitech wanted to secure Ryobi's business. Ryobi had large quantities of highly-desirable dross; however, it also had considerable quantities of flashings and turnings that it wanted processed.<sup>6</sup> Alumitech was willing to process all of Ryobi's scrap in hopes of securing Ryobi's lucrative dross business.

Before entering into a new reclamation contract, Ryobi initiated a thirty-day trial period, during which Alumitech and several other foundries would demonstrate which foundry could recover the greatest aluminum yield from Ryobi's scrap aluminum in the most cost-saving manner to Ryobi. There was no written contract between Ryobi and

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<sup>5</sup> The transcript of Reed's deposition testimony states her job title as "marking materials manager." (Bowlands' App. 187). We suspect that this is in error, and should read "marketing materials manager."

<sup>6</sup> Alumitech factory manager Phillip Brown stated the following during his deposition testimony:

A: We don't run turnings very often at all. \* \* \* But we want to try to save face with the customer and not burn bridges and so on . . . .

Q: For example, if it [processing the turnings] didn't work well, but maybe there was a greater good, like keeping a larger client happy and getting more of their dross, might you concede and say, 'I'll run it as a [sic] overall way to try and hold on to the other business?'

A: Well, that's specifically what happened with Ryobi . . . .

\* \* \*

Well, Ryobi is kind of unique in that they have this piece of the pie, this dross, that is very desirable for us to run, but they also create flash and turnings and in a quantity enough that it is a problem.

(Bowlands' App. 818-819).

Alumitech; however, Ryobi agreed to pay Alumitech approximately seven or eight cents a pound for the turnings it recycled during the trial period.

During their discussions, Funk of Ryobi advised Reed of Alumitech that the moisture content of its turnings was between 25% and 29%. Scrap turnings are best recycled when they are dry or their moisture content is low. Reed suggested alternate means of drying the turnings: (1) Ryobi could allow Alumitech to dilute the turnings with “concentrates,” which would “add to the volume . . . and cut[ ] the percentage of oil down,” thereby, accelerating the melting process, (Bowlands’ App. 834); or (2) Ryobi could allow Alumitech to ship the turnings to another company for drying, prior to processing, with Ryobi bearing the cost. (Bowlands’ App. 279).

Ryobi rejected both proposals believing that diluting the turnings with concentrates would skew the trial results and interfere with its ability to make an “apples-to-apples” assessment of each of the trial participants’ reclamation yield results.<sup>7</sup> (Bowlands’ App. 835). It also expressed concern about the increased cost associated with hiring another company to dry the turnings. Ryobi did not restrict Alumitech from drying the turnings by alternate means and at its own expense.

In October of 2002, Ryobi sent three truckloads of turnings – lot numbers J2182, J2275, and J2356 – to Alumitech. Alumitech accepted the truckload of turnings, which had a moisture content level of approximately 25%. For purposes of processing, Alumitech plant manager Brown believed that the moisture content to be “borderline on the safety side of things.” (Bowlands’ App. 836). Therefore, before beginning the

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<sup>7</sup> None of the other trial participants used concentrates when they processed Ryobi’s wet turnings.

reclamation process, Alumitech set the turnings out to dry by “storing them in the furnace room [which is] generally 20 to 30 degrees higher in temperature, very dry, and turnings will rapidly start to dry out.” (Bowlands’ App. 779). Alumitech also “had [the turnings] turned over once or twice” using a payloader<sup>8</sup> to pick up material and “push it on top of each other . . . so that you get the wetter materials on the bottom up to the top.” (Bowlands’ App. 844, 847). By the time Alumitech began processing on November 7, 2002, the moisture content of the turnings had been reduced to approximately 10%.<sup>9</sup>

On November 9, 2002, Alumitech furnace operator Sean Garrett continued processing the turnings with assistance from Bowland. Bowland was employed by Staffing Resources Incorporated (“SRI”) and had been sent to work on-site at Alumitech. Garrett would scoop up the turnings with a bobcat skid steer loader and charged them into the furnace, and Bowland, who was stationed at the operator’s control panel approximately twenty-five feet from the mouth of the furnace, would rotate the furnace to control the flare-up that naturally resulted as the lubricant on the turnings burned away. At some point during processing, the furnace erupted and ejected molten material onto Bowland, who suffered severe injuries.

On August 2, 2004, the Bowlands filed a complaint for damages and request for jury trial against S & R Enterprises, Maxon Corporation, E & S Metal, Air Products and Chemicals, MDY LLC, Linde Gas LLC, Henderson Fabricating, and Alumitech. On

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<sup>8</sup> A payloader is an excavating machine with a large scoop in front.

<sup>9</sup> Alumitech plant manager Brown testified that a moisture content level of 15% was his break-off point, as any higher levels would raise unsettling safety concerns.

November 1, 2004, the Bowlands amended their complaint to include Ryobi as a defendant. During the pendency of this lawsuit, several parties were dismissed. The remaining parties, with the exception of Ryobi, attended mediation on July 26, 2006. Subsequently, settlement was reached with all parties that attended the mediation. The Bowlands then advised Ryobi of their intention to proceed against it on the following theories of liability: (1) Ryobi was liable for the negligence of its independent contractor; and (2) Ryobi's negligence in its hiring, retention, or contracting with Alumitech when it knew or should have known that Alumitech could not process the turnings in a reasonably safe manner.

Discovery was conducted by the parties. On December 3, 2007, Ryobi filed a motion for summary judgment and memorandum of law, wherein it argued that the Bowlands' new theories had not been properly pled, and even if the theories were deemed viable, it was still entitled to summary judgment because there existed no genuine issue of material fact. On April 21, 2008, the trial court conducted a hearing on the motion, and on April 24, 2008, granted summary judgment in favor of Ryobi, stating the following in its order:

... Ryobi contends that [the Bowlands'] 'new' theories of recovery should not be considered because they were not properly pled. The Court is inclined to agree. However, because both parties have stated their intention to appeal this ruling, whatever the outcome, due to the unique circumstances of [the Bowlands'] claim against Ryobi, the Court instead will resolve this matter on the merits of the pending Motion for Summary Judgment.

(Order 22). The Bowlands now appeal.

#### DECISION

In their brief, the Bowlands first address Ryobi's contention that their claims were not properly pled. They also argue that the trial court erred in granting summary judgment in favor of Ryobi because genuine issues of material fact exist as to whether Ryobi owed them a non-delegable duty of care. Lastly, they contend that Ryobi's providing of the wet turnings to Alumitech for reclamation was the proximate cause of Bowland's injuries.<sup>10</sup>

Our standard of review with regard to summary judgments is as follows:

When reviewing a grant or denial of summary judgment, the standard of review is the same as the standard governing summary judgment in the trial court: whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. Summary judgment should be granted only if the evidence designated pursuant to Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. The party appealing a summary judgment ruling has the burden of persuading this Court that the grant or denial of summary judgment was erroneous. All evidence must be construed in favor of the nonmoving party, and all doubts as to the existence of a material issue must be resolved against the moving party. Questions of law, however, are reviewed de novo.

*Indiana Dept. of Environmental Management v. Construction Management Associates, L.L.C.*, 890 N.E.2d 107, 111-12 (Ind. Ct. App. 2008) (internal citations omitted).

The Bowlands have brought a negligence action against Ryobi. A plaintiff must establish three elements in order to recover on a negligence theory: "(1) a duty owed by the defendant to conform its conduct to a standard of care necessitated by its relationship with the [plaintiff]; (2) a breach of that duty; and (3) an injury proximately caused by the

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<sup>10</sup> We do not reach the proximate cause issue because we find the duty of care issue to be dispositive.

breach.” *Indiana Dept. of Transp. v. Howard*, 879 N.E.2d 1119, 1122 (Ind. Ct. App. 2008). To prevail on a motion for summary judgment in a negligence case, the defendant must establish that the undisputed material facts negate at least one element of the plaintiff’s claim or that the claim is barred by an affirmative defense. *Id.*

#### A. Properly Pled Claims

Ryobi contends that count III of the Bowlands’ second amended complaint did not put it on notice of the Bowlands’ intention to pursue liability under either the due precaution exception or Restatement (Second) of Torts Section 414. It argues,

[T]he focus in the allegations is the condition of the turnings as they were handed over to Alumitech, not the fact that they were handed over to Alumitech in the first place. In short, the Complaint is fairly read to allege that Ryobi was negligent in giving the wet turnings to Alumitech, was liable under Count IV because the wet turnings were unreasonably dangerous, and was liable under Count V for failing to warn the Plaintiff of the dangers associated with the turnings. Negligent products liability co-exists in Indiana along side [sic] strict products liability. \* \* \* Because of this, any suggestion now by the [Bowlands] that Ryobi was put on notice by the language of count III that the [Bowlands] intended to pursue liability under theories other than a products-related theory rings hollow. To allow the new theories to proceed would be to countenance trial by ambush.

Ryobi’s Br. at 10 (internal citations omitted).

The Bowlands counter that they pled the operative facts in a manner sufficient to put Ryobi on notice that they were pursuing relief under a principal/independent contractor theory of liability. They acknowledge that their second amended complaint does not “specifically allege a principal/independent contractor theory of liability [or] mention Restatement (Second) of Torts Section 414,” but insist that they are not required

under Indiana law of notice-pleading “to adopt such a specific theory of recovery.” Bowlands’ Br. at 20.

Indiana Trial Rule 8(A), Indiana’s notice pleading provision, requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” *City of Clinton v. Goldner*, 885 N.E.2d 67, 74 (Ind. Ct. App. 2008). “[A] pleading need not adopt a specific legal theory of recovery to be adhered to throughout the case.” *Id.* (quoting *Binninger v. Hendricks County Bd. of Zoning Comm’rs*, 668 N.E.2d 269, 272 (Ind. Ct. App. 1996)). “Notice pleading merely requires pleading the operative facts so as to place the defendant on notice as to the evidence to be presented at trial”; thus, under notice pleading, the issue of whether a complaint sufficiently pleads a certain claim turns on whether the opposing party has been sufficiently notified concerning the claim so as to be able to prepare to meet it. *Id.*

The Bowlands’ second amended complaint stated, in relevant part:

10. Ryobi Die Casting, Inc. is an Indiana Corporation with its principal place of business located in Shelbyville, Indiana, and is engaged in the business of providing aluminum turnings to facilities like the Alumitech facility in Wabash, Indiana.

\* \* \*

15. On November 9, 2002, Aaron Bowland was an employee of Staffing Resources, Inc., (SRI) and was sent by his employer to the Alumitech facility in Wabash, Indiana.

16. While in the course and scope of his employment with SRI and while working as an independent contractor for Alumitech, Aaron Bowland sustained third degree burns to 60% of his body when a rotary furnace on the Alumitech premises erupted in a violent explosion of molten aluminum, dust and gases.

\* \* \*

### **Count III – PRODUCT DEFENDANTS -- NEGLIGENCE**

Plaintiffs, for their claim of relief against [Ryobi and the other (now settled) defendants], (“Product Defendants”) allege and state as follows:

33. Plaintiffs reallege and incorporate herein by reference rhetorical paragraphs 1 through 32 of their Complaint.

34. Prior to November 9, 2002, the Product Defendants provided, designed, manufactured, introduced into the stream of commerce, installed, and/or maintained certain software, aluminum turnings, rotary furnace equipment, related control systems and components at the Alumitech facility in Wabash, Indiana.

35. The software, aluminum turnings, rotary furnace, related control systems and components were negligently provided, designed, manufactured, installed, and/or maintained by the Product Defendants prior to Aaron Bowland’s injuries of November 9, 2002.

36. As a direct and proximate result of the Product Defendants’ negligence, Aaron Bowland sustained serious and excruciatingly painful and permanent physical injuries, impairment, disfigurement and emotional distress.

37. As a further direct and proximate result of the Product Defendants’ negligence, Aaron Bowland has incurred in excess of One Million Dollars (\$1,000,000.00) in medical expenses, suffered lost wages and has been impaired in his future income earning potential.

38. As a direct and proximate result against that Product Defendants’ negligence, Christina Bowland has suffered the loss of services of her husband.

(Bowlands’ App. 88-89).

In support of its contention that the Bowlands’ “due precaution” and Restatement (2d) of Torts section 414 claims were not properly pled, Ryobi relies heavily upon *Stryczek v. Methodist Hospitals, Inc.*, 694 N.E.2d 1186 (Ind. Ct. App. 1998).

In *Stryczek*, the plaintiff filed a medical malpractice claim against a hospital and two physicians who had treated her for cancer. The hospital filed a motion for summary

judgment, which motion was granted. On appeal, the plaintiff argued, in relevant part, that genuine issues of material fact existed as to the hospital's alleged negligent hiring and inadequate staffing. With regard to these claims, the plaintiff's complaint merely alleged that the hospital and physicians "were assisted by technicians, nurses and pathologists duly employed by the hospital." *Id.* at 1192.

A panel of this court found that the plaintiff's complaint "d[id] not specifically allege" the negligent hiring and inadequate staffing claims, and contained "no factual allegations to support them." *Id.* at 1191. We noted that although, under Indiana's notice pleading system, pleadings "need not necessarily adopt a specific legal theory of recovery to be adhered to throughout the case," they must "plead the operative facts so as to place the defendant on notice as to the evidence to be presented at trial." *Id.* Applying the law to the facts in *Stryczek*, we concluded that the plaintiff had failed to plead the operative facts as to her negligent hiring and inadequate staffing claims. Her assertion that the defendants were assisted by technicians, nurses and pathologists did not demonstrate how the hospital had either hired negligently or staffed inadequately. Nor did the plaintiff's complaint indicate "whom Methodist hired negligently" or "how its staff was inadequate." *Id.* Accordingly, we deemed the claims waived.

Here, as in *Stryczek*, the Bowlands' second amended complaint does not specifically allege "due precaution" and Restatement (2d) of Torts Section 414 or contain supporting factual allegations. It does not allege essential operative facts such as the following: that Ryobi provided wet turnings; that processing wet scrap aluminum is allegedly dangerous, so much so that probable harm may result to others absent due

precaution; that Ryobi should have foreseen the threat to Bowland and other individuals who worked with wet turnings; that Ryobi failed to warn Bowland and other employees of said threat; or that Ryobi retained substantial control over the manner in which its turnings were processed. Accordingly, we conclude that the Bowlands have waived these claims.

Waiver notwithstanding, the trial court's grant of summary judgment in favor of Ryobi was proper because Ryobi successfully negated at least one element of the Bowlands' negligence claim.

#### B. Duty of Care

The Bowlands argue that in the context of their contractee-independent contractor relationship, Ryobi owed a non-delegable duty to Bowland because aluminum reclamation work is sufficiently dangerous that probable harm is likely to result to others, unless due precaution is taken; and also because Ryobi allegedly retained control over the manner in which Alumitech processed the turnings. We disagree with both contentions.

“The question of whether a duty to exercise care arises is governed by the relationship of the parties and is an issue of law within the province of the court.” *Douglass v. Irvin*, 549 N.E.2d 368, 369 (Ind. 1990). “Absent a duty, there can be no breach and, therefore, no recovery for the plaintiff in a negligence cause of action.” *Stumpf v. Hagerman Const. Corp.*, 863 N.E.2d 871, 876 (Ind. Ct. App. 2007).

#### 1. Non-Delegable Duty – Due Precaution

Under Indiana common law, it is well established that an employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace and consequently is not liable for the negligence

of the independent contractor. The rationale behind this rule is that “a general contractor typically exercises little, if any, control over the means or manner of the work of its subcontractors, and requires only that the completed work meet the specifications of the owner in its contract with the general contractor.”

*Id.* (internal citations omitted). Indiana recognizes five exceptions to this general rule: (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal. *Selby v. N. Ind. Pub. Serv. Co.*, 851 N.E.2d 333, 337 (Ind. Ct. App. 2006), *trans. denied*. “These are the only bases for establishing a duty of care by a principal who acts through an independent contractor.” *Becker v. Kreilein*, 770 N.E.2d 315, 318 (Ind. 2002).

The duties associated with Indiana’s five exceptions are considered non-delegable, and an employer will be liable for the negligence of the contractor, because the responsibilities are deemed ‘so important to the community’ that the employer should not be permitted to transfer these duties to another . . . . The exceptions encourage the employer of the contractor to participate in the control of work covered by the exceptions in order to minimize the risk of resulting injuries.

*Howard*, 879 N.E.2d at 1122 (quoting *Bagley v. Insight Commc’ns Co.*, 658 N.E.2d 584, 587-88 (Ind. 1995)) (internal citations omitted).

The Bowlands invoke the fourth exception in two parts. First, they contend that Ryobi, as principal, is liable for the negligence of its independent contractor, Alumitech, because Ryobi provided wet scrap aluminum to Alumitech for processing when it knew

or should have known that processing wet scrap aluminum is so dangerous that probable harm is likely to result to others unless due precaution is taken.

For [the fourth] exception to apply, it must be established that the principal, at the time of the contract, should have foreseen that the performance of the work or the conditions under which it was to be performed would, absent precautionary measures, probably cause injury. ‘The danger that the principal must foresee must be substantially similar to the accident that produced the injury.’ More than a mere possibility of harm is required; the defendant should have foreseen the probability of such harm. Thus, application of this exception requires an examination of whether, at the time an individual was employed as an independent contractor, there existed a peculiar risk which was reasonably foreseeable and which recognizably called for precautionary measures.

*Id.* (internal citations omitted). “The essence of this exception is the foreseeability of the peculiar risk involved in the work and of the need for special precautions.” *McDaniel v. State*, 709 N.E.2d 17, 22 (Ind. Ct. App. 1999) (quoting *Bagley*, 658 N.E.2d at 588). “Liability is established only when, at the time of contracting, the employer should have foreseen that injury to others was ‘likely to happen.’” *Red Roof Inns, Inc. v. Purvis*, 691 N.E.2d 1341, 1345-46 (Ind. Ct. App. 1998), *trans. denied*.

We have previously held that the term “peculiar risk” refers to

the risk of a particularized harm specific to the work being performed or the conditions under which it is performed. Moreover, the exception applies only when the risk involved is something more than the routine and predictable hazards generally associated with a given occupation: it must be a risk unique to the circumstances of a given job. Finally, the actual injury sustained must result from the particularized harm identified by the risk.

*McDaniel*, 709 N.E.2d at 22.

In *McDaniel*, principal Acme hired independent contractor Wilson Water and Sewer Company (“Wilson”) to do underground plumbing work. *McDaniel*, a Wilson

employee, was killed when the walls of a trench caved in upon him. McDaniel’s estate sued Acme for negligence. Acme moved for and was granted summary judgment on its claim that it owed McDaniel no duty of care. On appeal, we upheld the trial court’s grant of summary judgment, finding that cave-ins were not a peculiar risk associated with trenching, but rather were “a routine and predictable hazard” thereof as evidenced by the fact that the construction industry had crafted safety measures to prevent them. *Id.* Finding no evidence that (1) the construction project involved a cave-in risk “that was somehow unique or distinguishable from the general risk of cave-ins associated with trenching” or that (2) extraordinary precautions were necessary and should have been taken, we concluded that Acme could not be held liable for McDaniel’s death.

Here, the Bowlands’ designated evidence includes the Aluminum Association’s Guidelines For Handling Molten Aluminum (“Guidelines”), wherein section 28 addresses the risk or potential for explosions when liquids at widely different temperatures, such as molten metals and water, are combined.<sup>11</sup> As in *McDaniel*, the Guidelines indicate that

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<sup>11</sup> The Guidelines state,

Based on the many years of research into the cause and prevention of molten aluminum-water explosions, and from the many investigations of plant explosions, it is apparent that there are three different types of explosions that can occur.

\* \* \*

When molten aluminum and water come into contact during casting operations, the resulting reaction can vary from a harmless evolution of steam to a violent explosion with extensive damage and loss of life. As a result of controls developed by the industry, only a small percentage of the spills of molten aluminum into water that occur during direct chill casting operations lead to a serious explosion even when large amounts of molten metal are involved. The situation, however, is quite different in melting and transfer operations. If [as here] water is introduced under molten aluminum in a furnace, trough, mold or drain pan, or in casting operations if water is somehow introduced under molten aluminum in a mold or starting block, an explosion of some magnitude is almost certain to occur.”

(Bowlands’ App. 1107).

the risk of explosions from processing scrap aluminum is not a “peculiar risk” associated with aluminum reclamation, but rather, is a routine and predictable hazard associated therewith. The aluminum industry has studied the conditions leading to explosions in an effort to develop safety precautions for application in the processing of scrap aluminum. (Bowlands’ App. 1109). The Aluminum Association recommends that scrap aluminum should be dry or low in moisture content before it is charged into the furnace during the reclamation process. In a section devoted entirely to the precautionary measure of “Drying of Material Charged to the Furnace,” the Guidelines state that “[t]he capability to dry scrap or other charge materials possibly containing moisture is a critical feature of a safe [aluminum reclamation] operation.” (Bowlands’ App. 1082).

The designated evidence includes the deposition testimony of Alumitech plant manager Phil Brown, who described the “incremental charg[ing]” process utilized in processing Ryobi’s turnings as follows in the ensuing colloquy:

A: \* \* \* [T]he secret to charging wet turnings is to have a very hot furnace, and when I say hot, temperatures high enough that the walls will melt aluminum, have the appropriate flux in the furnace melted, and although that seems to set up in the layman’s eyes a scenario for disaster, indeed what it does is from the moment that this small increment of turnings gets even close to the mouth of the furnace, there is a huge drive off of moisture, and as the turnings are dumped . . . into the front of the furnace, it acts like a hearth. After the furnace starts to roll, the turnings start to spread because the furnace is sitting at an angle.

In doing so, you just expedite the drive off of moisture, and it so happens that most of all of this moisture content is heavily laden in some kind of oil, whether it be water soluble or not, it will burn, and this also helps drive the moisture away.

Q: I’m sorry to interrupt, but how, because it catches fire and just hopefully burns it up real quick?

A: Correct. Putting too much in the furnace at one time will cause a big fire in the front of the furnace, which is not good. So this incremental charging method ends up being, and this is the problem, fairly slow. So it makes it very difficult to be efficient, because you are putting in probably less than a tenth of the pounds at a time as you could dress.

Q: \* \* \* In general, . . . when you were doing the turnings, you would implement the incremental charge philosophy when recycling those turnings?

A: Correct.

Q: And this incremental charge philosophy, you would heat up the walls hot enough that they could melt the aluminum, the walls of the rotary furnace, and there would be flux in the bottom of that furnace that has also been heated?

A: And melted, correct.

Q: And melted, okay. Then you would take an increment of the turnings, you would bring them to the front of that furnace and more or less dump them on that furnace, then as the furnace rotated, it would naturally spread those turnings out along the wall of that furnace, the idea being that these walls that are now hot enough, will either make the water evaporate or ask the oil to catch on fire and then burn up the water [moisture] before they ultimately fall down into the bottom of the furnace?

A: That's correct.

Q: Okay. So you do that once, first load gets put on the ledge, it rotates, hopefully evaporates and goes down. Then you bring another load and do the same thing, and then slowly, but surely, you are going to have a full furnace of the turnings and then you will cook it for good, pardon my use, but you will make it hotter at that point?

A: Pretty good, I'll make you a furnace expert.

(Bowlands' App. 779-80). Notably, Section 14.2 of the Guidelines states,

If drying of charge material is to be accomplished by setting the material on the ledge of an operating furnace (**not recommended**), extreme care should be taken to prevent it from being charged too soon or prematurely

falling into the molten aluminum bath. \* \* \* **This situation has been identified as one of the primary causes of molten metal explosions.**

(Bowlands' App. 1082), emphasis added as to the former, emphasis in original as to the latter.

Based upon the foregoing, we conclude that the onus was on Alumitech, the independent contractor, to comply with widely-known industry standards by (1) drying or reducing the moisture content of wet turnings prior to charging them into furnaces and (2) refraining from using drying practices explicitly identified as potentially catastrophic by the Aluminum Association. With regard to the latter, the designated evidence gives no support for a finding that Alumitech alerted Ryobi of its intention to employ such problematic practices. Again, we cite *McDaniel* for the proposition that "a contractee may reasonably expect that an independent contractor will follow recommended procedures to ensure the safety of its workers." 709 N.E.2d at 23.

We find no designated evidence to support a finding that Alumitech's processing of Ryobi's wet turnings involved a peculiar risk of explosion that was "somehow unique from the general risk" of explosions generally associated with aluminum reclamation; nor is there evidence of extraordinary precautions (beyond basic drying or reduction of moisture content of wet turnings) that Ryobi should have been undertaken. 709 N.E.2d at 22.

Foreseeability is also an essential element of the due precaution exception. *Id.* (citing *Red Roof Inns*, 691 N.E.2d at 1345).

The contractee of an independent contractor may always anticipate that if the contractor is negligent toward third persons, some harm to those

persons may result. More than the possibility of harm, however, is required; a plaintiff must show a probability of such harm. *Id.* In [*McDaniel*], the activity involved was trenching and the harm was the cave-in and *McDaniel*'s resultant death, and the Estate again points to the relevant statistics to show that Acme should have foreseen the probability of a cave-in. [T]he use of proper procedures minimizes any dangers associated with trenching. A contractee may reasonably expect that an independent contractor will follow recommended procedures to ensure the safety of its workers.

Even if we had found that a peculiar risk of cave-in existed . . . , there is no evidence to suggest that Acme was aware of an unusually unsafe or dangerous condition at the time the sewer trenches were contracted for, such that Acme should have foreseen a problem. Acme never inspected the progress of the work, nor did it have knowledge of the proper procedures to be used in trenching. Finally, nothing in the designated evidence before us supports the conclusion that Acme should have foreseen the probability that Wilson's employees would not use recommended procedures and a cave-in and *McDaniel*'s death would result.

*McDaniel*, 709 N.E.2d at 23. Accordingly, we found no proper basis upon which to invoke an exception to the general rule of contractee nonliability.

In the instant case, we have not found a peculiar risk of explosion associated with aluminum reclamation from wet turnings. The designated evidence does not support the Bowlands' contention that Ryobi should have foreseen the probability of an explosion that would cause serious injury to Bowland. The Guidelines indicate that it is not unusual for foundries to accept wet scrap for processing and that aluminum industry experts simply expect such foundries to ensure that wet scrap aluminum has been properly dried or reduced to an acceptable moisture level before being processed.

The designated evidence reveals that Alumitech is recognized as an expert in the field of aluminum reclamation with a good reputation for safety. "A contractee [principal] may reasonably expect that an independent contractor will follow

recommended procedures to ensure the safety of its workers.” *Id.* As a result, we find that Ryobi may reasonably have expected Alumitech to follow industry-recommended procedures, such as taking basic precautionary measures by sufficiently drying or reducing the moisture content of the wet turnings prior to processing, in order to prevent explosions. There is no support in the designated evidence that Ryobi had knowledge of an unusually unsafe or dangerous condition at the time Alumitech participated in the trial, such that Ryobi was or should have been aware that Alumitech’s process would probably cause injury to others absent due precaution. Thus, the fourth exception does not apply.

The Bowlands have failed to either demonstrate (1) that there is a peculiar risk associated with the processing of wet turnings; or (2) that Ryobi should have foreseen the probability of an explosion that would cause serious injury to Bowland. It was reasonable for Ryobi to believe that Alumitech, an expert in the field of aluminum reclamation, would take the necessary precaution of sufficiently drying or reducing the moisture content of the turnings before processing, in order to guard against an explosion. Based upon the foregoing, we find no genuine issue of material fact.

## 2. Control

Next, the Bowlands contend that Ryobi owed a duty of care to Bowland because it retained sufficient control over the manner in which the turnings were processed. Bowlands’ Br. at 14. We disagree.

In support of their contention, the Bowlands cite section 414 of the Restatement (Second) of Torts, which provides:

One who entrusts work to an independent contractor, but who retains control over any part of the work is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) Torts, § 414.

The designated evidence is comprised largely of depositions with Alumitech staffers, including Alumitech plant manager Phil Brown who oversaw the processing of Ryobi's wet turnings. He testified to Alumitech's "good reputation" for safety and acknowledged that Alumitech, as well as the entire aluminum industry, had developed methods and procedures aimed at significantly reducing or eliminating the risk of moisture explosions and injury from the processing of wet turnings. In the following colloquy between counsel for the Bowlands and Brown, Brown establishes that Ryobi did not retain control over the manner in which the turnings were processed, and therefore, did not owe Bowland a duty of care.

Q: ...[W]ould [it] be a fair statement to say that methods and procedures have been developed by Alumitech and in the industry, to significantly reduce or, in fact, eliminate the risk of a moisture explosion when processing wet turnings?

A: That is a good – fair statement.

Q: And those methods and procedures are under the control of the aluminum processor such as Alumitech?

A: That's correct.

Q: In utilizing methods and procedures to significantly reduce or eliminate the risk of a moisture explosion processing wet turnings, are you thereby significantly reducing the risk of injury to someone; fair statement?

A: Fair as it relates to moisture, yes.

Q: Yes. Now, there are other ways in which to protect Alumitech workers from the risk of a moisture reaction or explosion when processing wet turnings . . . , are there not?

A: I can think of some, yes.

Q: Obviously, the way in which you set up the furnace and position the operators and those who are controlling the furnace would be important?

A: It would be.

Q: That's something that the Alumitech – the aluminum reclaimer has control over?

A: Correct.

Q: Additionally, you can reduce – significantly reduce the risk of harm, as a result of a moisture explosion, by addressing personal protection for the people who are working in the area of the furnace?

A: Absolutely.

Q: That's also something that the aluminum processor has control over?

A: Correct.

Q: These are things that Alumitech would have had control over when processing the Ryobi turnings?

A: That is correct.

Q: You can also add to personal protection for individuals by providing shields, if they're necessary, from furnace reactions?

A: That's correct.

Q: All of these things, in setting up methods and procedures for . . . significantly reducing the risk from a – of a moisture reaction when processing wet turnings, are things that Alumitech can control during the operation in order to significantly reduce the risk?

A: That's correct.

\* \* \*

Q: And I think you told us that, in your opinion, based upon your experience in the industry, that Alumitech was capable of introducing these methods, procedure, practices and of having the kind of equipment in order to significantly reduce the risk of these events?

A: Yes, sir.

Q: And, if Alumitech needed to get anything to enhance the safety out at the operation when recycling wet turnings, I take it that Alumitech would have had the resources with which to obtain whatever was necessary for the safety of its employees?

A: We would have.

Q: \* \* \* [I]f you saw something out there that you felt prevented your people from safely processing wet turnings, you would have seen to it that that was changed or that something was done to provide protection for them?

A: I am ultimately responsible for the safety of my employees, yes.

Q: [O]ne of your responsibilities was to significantly reduce the risk of harm to your employees out at Alumitech when they were processing wet turnings; is that correct?

A: Correct.

Q: And, as far as you know, you were not handcuffed, in any way, in that regard, were you?

A: No.

Q: And . . . Alumitech had the reputation in the marketplace that they were able to provide safety to their employees and in processing wet turnings?

A: That's correct.

Q: Did Ryobi have any other criteria for processing their wet turnings other than the criteria that they did not want concentrates or fines included, if you know?

A: They did not – they did not dictate to us procedures or practices.

Q: Okay. So Ryobi had nothing to do with the procedures, practices, methods, equipment used for the processing of the wet turnings; is that correct?

A: That's correct.

Q: They weren't present when . . . the accident occurred?

A: No, they were not.

Q: Okay. And as far as you know, they would have no way, really, of knowing what was going on at the [Alumitech] plant at the time the wet turnings were processing – being processed?

A: At that specific time, no.

\* \* \*

Q: Okay. Did you ever explore with Ryobi the extent of their knowledge as to how . . . Alumitech went about processing wet turnings?

A: No.

Q: So you would have no idea, as you sit here now, what Ryobi knew about Alumitech methods, practices, and procedures?

A: Not directly, no.

Q: \* \* \* Was it your understanding that Ryobi was under the impression that Alumitech could safely, competently, and effectively process their wet turnings; was that your feeling?

A: Yes, I believe that's correct.

(Bowlands' App. 257-58, 262-63).

It is undisputed that, in October of 2002, Ryobi delivered and Alumitech accepted three truckloads of turnings. The designated evidence supports the finding that after Alumitech accepted the turnings, it commenced to control the drying process, safety

practices, chemical processes employed, furnace placement, furnace operator training, and other critical procedures and practices associated with processing Ryobi's aluminum. Moreover, Alumitech was free to reject Ryobi's turnings or to either enhance safety measures or reduce associated risks. The Bowlands have not demonstrated that Ryobi retained sufficient control such as to expose it to liability for Bowland's injury.

The Bowlands insist, however, that Ryobi's instructions to Alumitech to refrain from (1) sending the turnings to another company for drying; or (2) diluting the turnings with concentrates for drying constituted a sufficient retention of control such that Ryobi owed Bowland a duty of care. We disagree.

First, Ryobi's objection to sending the turnings out to another company at Ryobi's expense did not constitute a retention of control upon receipt of the turnings. Alumitech's plant manager simply found alternative means of drying the turnings on-site. Moreover, as to Ryobi's objection to the use of concentrates, the designated evidence reveals that Ryobi asked Alumitech to process its turnings without the use of concentrates in order to ensure that the trial results were not skewed and could be compared on an "apples-to-apples" basis with the results from the other trial participants, who were not using concentrates. Furthermore, in his testimony, Brown acknowledged the experimental and "theoretical" concept of using concentrates to reduce moisture. (Bowlands' App. 279). The only proven attribute of using concentrates is that it speeds up the reclamation process. The Bowlands introduced no expert testimony to support their contention that the use of concentrates eliminates moisture; nor is the use of

concentrates listed in the Guidelines as an industry-recognized means of drying scrap aluminum.

We decline the Bowlands' invitation to find an exception to the general rule of nonliability. The designated evidence does not support a finding that Ryobi owed a non-delegable duty of care to Bowland in his capacity as an employee of independent contractor-Alumitech. Nor does the designated evidence support a finding that Ryobi retained sufficient control over the manner in which the turnings were dried and ultimately processed, such that Ryobi owed a duty to exercise reasonable care to Bowland.

Based upon the foregoing, we conclude that Ryobi successfully negated the "duty element" of the Bowlands' negligence claim. The trial court correctly granted summary judgment in Ryobi's favor. *See Howard*, 879 N.E.2d at 1122 ("To prevail on a motion for summary judgment in a negligence case, the defendant must establish that the undisputed material facts negate at least one element of the plaintiff's claim or that the claim is barred by an affirmative defense.").

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.